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SINNERS OR SAINTS: CHILD SOLDIERS AND THE PERSECUTOR BAR TO ASYLUM AFTER *NEGUSIE v. HOLDER*

BRYAN LONEGAN*

Abstract: There are an estimated 250,000 child soldiers—boys and girls under the age of eighteen—who are being compelled to serve in more than fifteen conflicts worldwide. Child soldiers are forcibly recruited or abducted and are used as combatants, messengers, porters, cooks, and to provide sexual services. International law now recognizes child soldiers as victims of war crimes, deserving of state compassion. The U.S. Department of Homeland Security, however, has opposed asylum for child soldiers on the grounds that their military service subjects them to the “persecutor bar.” Barring child soldiers from asylum protection penalizes them for having been the victims of a crime and undercuts all efforts to protect them. This Article argues that a per se bar of child soldiers from asylum contradicts the United States’ adherence to the international view that the use of child soldiers constitutes a violation of human rights, domestic laws declaring recruitment of child soldiers a crime, and active support of the eradication of the use of child soldiers. Instead, child soldiers should be able to argue that their conduct falls beyond the scope and intent of the persecutor bar. This Article concludes by offering an approach to determine when a child soldier should be subjected to the persecutor bar that balances the seriousness of the child soldier’s actions against the circumstances under which he or she was recruited.

INTRODUCTION

In 2004, Salifou Yankene was fifteen years old when armed forces from the Mouvement Patriotique de Côte d’Ivoire raided the refugee camp where Salifou, his mother, and his siblings had lived since Salifou’s father and sister were gunned down outside their home three years be-

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fore.¹ When the soldiers grabbed Salifou and his younger brother Abdul, their mother grabbed hold of Abdul's arm.² Because of their mother's resistance, the soldiers cut off Abdul's hand in full view of Salifou.³

For the next two years, Salifou lived and fought with the rebel forces.⁴ On pain of death, he participated in raids where he looted, fired upon people, abducted new child soldier recruits, and hit and kicked people without mercy.⁵ Through bribery and stealth, Salifou's mother arranged for his escape from the rebel group and his flight to the United States, where he sought asylum.⁶

An immigration judge found Salifou's claim of forced conscription to be credible and granted his asylum application.⁷ The Department of Homeland Security (DHS), however, appealed the ruling.⁸ DHS argued that, by virtue of his actions as a child soldier, Salifou was a "persecutor" and thus statutorily barred from receiving the protection of the United States.⁹ This argument is, at best, problematic.

Under international law, the term "child soldier" applies to any person under age eighteen who either "take[s] a direct part in hostilities" as a member of governmental armed forces; has been "compulsorily recruited into [governmental] armed forces;" has been "recruit[ed] or use[d] in hostilities" by armed forces distinct from the armed forces of a state; or is under sixteen and voluntarily recruited into armed service.¹⁰ In 2007, child soldiers actively fought in more

¹ Nina Bernstein, *Taking the War Out of a Child Soldier*, N.Y. TIMES, May 13, 2007, at M29. The Mouvement Patriotique de Côte d'Ivoire was a rebel group that fought in the civil war raging in Côte d'Ivoire. *See id.*

² *Id.*

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ Bernstein, *supra* note 1.

⁷ *See id.*; U.S. Campaign to Stop the Use of Child Soldiers, *United States of America: Compliance with the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict*, HUM. RTS. WATCH, 10 (Nov. 2007), http://www.hrw.org/pub/2007/us/US_OP_alternative_report112107.pdf.

⁸ *See* U.S. Campaign to Stop the Use of Child Soldiers, *supra* note 7, at 10.

⁹ *See id.* The author is counsel to Yankene in these proceedings.

¹⁰ *See* Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict and on the Sale of Children, Child Prostitution, and Child Pornography, G.A. Res. 54/263, Annex I, arts. 2, 4(1), U.N. Doc. A/RES/54/263 (May 25, 2000) [hereinafter Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict]; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) art. 77, *adopted* June 8, 1977, 1125 U.N.T.S. 3 [hereinafter Geneva Protocol I]; Convention on the Rights of the Child art. 38, *opened for signature* Nov. 20, 1989, 1577 U.N.T.S. 3 [hereinafter CRC].

than fifteen different countries around the world.¹¹ The United Nations Children's Fund (UNICEF) estimates that up to 250,000 child soldiers currently participate in armed conflict.¹²

The international community recognizes child soldiers as victims that deserve state compassion and care.¹³ To the narrow extent that the international community has recognized the limited culpability of children for acts carried out as combatants, it does so with a priority placed on rehabilitation and reintegration into society, not punishment.¹⁴ Over 150 countries have ratified treaties prohibiting the recruitment or use of children under the age of fifteen as soldiers; these treaties firmly and unambiguously identify such recruitment as a war crime and a crime against humanity.¹⁵

The United States, through Congress's ratification of these international treaties, has fully embraced the notion that the recruitment of child soldiers is a war crime.¹⁶ In addition, Congress has made the recruitment of child soldiers a violation of domestic law as well as

¹¹ See U.N. Secretary-General, *Children and Armed Conflict: Rep. of the Secretary-General*, ¶¶ 172–73, U.N. Doc. A/62/609-S/2007/757 (Dec. 21, 2007); see also Susan Tiefenbrun, *Child Soldiers, Slavery and the Trafficking of Children*, 31 FORDHAM INT'L L.J. 415, 422 (2008).

¹² Press Release, UNICEF, Paris Conference "Free Children from War" (Feb. 12, 2009), http://www.unicef.org/media/media_38208.html; see Tiefenbrun, *supra* note 11, at 421.

¹³ See Matthew Happold, *Child Soldiers: Victims or Perpetrators?*, 29 U. LA VERNE L. REV. 56, 70 (2008).

¹⁴ See *id.* at 70–72. See generally CRC, *supra* note 10, art. 38 (outlining the legal rights and protections to which children who are affected by armed conflict are entitled).

¹⁵ See Convention Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour arts. 3, 7, *adopted* June 17, 1999, 2133 U.N.T.S. 161 [hereinafter Worst Forms of Child Labour Convention]; CRC, *supra* note 10, art. 38; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) art. 4(3), *adopted* June 8, 1977, 1125 U.N.T.S. 609 [hereinafter Geneva Protocol II]; Geneva Protocol I, *supra* note 10, art. 77; see also Status of the Convention Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour, UNITED NATIONS, <http://treaties.un.org/pages/showDetails.aspx?objid=080000028008ccbd> (last visited Jan. 20, 2011); Status of the Convention on the Rights of the Child, UNITED NATIONS, http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11&chapter=4&lang=en (last visited Jan. 20, 2011); Status of the Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), UNITED NATIONS, <http://treaties.un.org/Pages/showDetails.aspx?objid=08000002800f3586> (last visited Jan. 20, 2011); Status of the Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), UNITED NATIONS, <http://treaties.un.org/Pages/showDetails.aspx?objid=08000002800f3cb8> (last visited Jan. 20, 2011).

¹⁶ See Press Release, U.S. Dep't of State, Ratification of Optional Protocols to the Convention on the Rights of the Child (Dec. 23, 2002), <http://2001-2009.state.gov/r/pa/prs/ps/2002/16198.htm>; see also Worst Forms of Child Labour Convention, *supra* note 15, arts. 3, 7.

grounds for deportation.¹⁷ Moreover, the United States has been a leading donor to the effort to rehabilitate child soldiers.¹⁸

Given the adherence of the United States to the international view that the use of child soldiers constitutes a violation of human rights, the U.S. domestic laws declaring child soldier recruitment a crime, and the nation's active support for eradicating the use of child soldiers, DHS's position that child soldiers are persecutors is paradoxical.¹⁹ Barring child soldiers from asylum protection penalizes them for having been the victims of a crime and undercuts all of the United States' efforts to protect them. Therefore, asylum is an important weapon in the fight against the exploitation of child soldiers.

Domestic law allows the attorney general to grant asylum to anyone who falls within the definition of a "refugee."²⁰ The definition of refugee, however, does not apply to anyone who "incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion."²¹ In applying this "persecutor bar," the Board of Immigration Appeals (BIA or "Board") and federal circuit courts have relied on *Fedorenko v. United States*, which held that the post-World War II legislation known as the Displaced Persons Act did not create a voluntariness exception to the persecutor bar.²² Reliance on *Fedorenko* as a guide for interpreting the persecutor bar caused conflicting results.²³ On March 3, 2009, however, the Supreme Court held in *Negusie v. Holder* that the Board's reliance on *Fedorenko* was misplaced; *Fedorenko*, the

¹⁷ See Child Soldiers Accountability Act of 2008, Pub. L. No. 110-340, § 2, 122 Stat. 3735, 3735 (codified as amended at 18 U.S.C.A. § 2442 (West Supp. 2010)).

¹⁸ See Report of U.S. to U.N. Comm. on the Rights of the Child, Consideration of Reports Submitted by States Parties Under Article 8, Paragraph 1, of the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, ¶ 34, U.N. Doc. CRC/C/OPAC/USA/1 (June 22, 2007) [hereinafter U.S. Report on the Optional Protocol]; see also Happold, *supra* note 13, at 64.

¹⁹ See Child Soldiers Accountability Act of 2008 § 2; U.S. Report on the Optional Protocol, *supra* note 18, ¶ 34; Happold, *supra* note 13, at 64; *supra* notes 8–9, 16–18 and accompanying text.

²⁰ See 8 U.S.C. § 1158(b)(1)(A) (2006); see also *id.* § 1101(a)(42)(A) (defining a refugee as a person who is unable or unwilling to return to his home country on account of a well-founded fear of persecution due to the person's race, religion, nationality, membership in a social group, or political opinion).

²¹ 8 U.S.C. § 1158(b)(2)(A)(i).

²² See *Fedorenko v. United States*, 449 U.S. 490, 512 (1981).

²³ See *infra* Part II.

Court found, concerned a different statutory construction.²⁴ Applying the first step of *Chevron* deference, the Court held that the persecutor statute was ambiguous and it remanded the case to the Board to reconsider under the current statutory framework.²⁵

This Article argues that special provisions must be made to address the application of the persecutor bar to child soldiers. Even if the Board decides that there is no voluntariness defense to the persecutor bar, the development of both international customary and U.S. domestic laws regarding the use of child soldiers, the fact that child soldiers are recognized as victims worthy of protection, and traditional notions of the diminished responsibility of juveniles all support this conclusion. Part I briefly discusses the problems related to establishing a claim to asylum for a child soldier. Part II discusses the persecutor bar in general and its applicability to the circumstances of child soldiers. Lastly, Part III offers a simple approach for applying the persecutor bar to child soldiers applying for asylum in the United States.

I. THE ELIGIBILITY OF CHILD SOLDIERS FOR ASYLUM

Before reaching the issue of whether a child soldier is precluded from asylum as a persecutor, it is worth briefly exploring on what grounds a child soldier would be eligible for asylum in the first place. To prevail on an asylum claim, the applicant must show either actual persecution in the past on account of a protected ground or a well-founded fear of persecution in the future on account of a protected ground.²⁶ Thus, child soldiers are confronted with two threshold issues: First, establishing that someone has persecuted or likely will persecute them; and second, proving that the persecution was or would be based on a protected ground.²⁷

Persecution has been defined as “threats to life, confinement, torture, and economic restrictions so severe that they constitute a real threat to life or freedom.”²⁸ General upheaval resulting from civil strife or war is insufficient to establish persecution.²⁹ Further, required ser-

²⁴ See *Negusie v. Holder*, 129 S. Ct. 1159, 1163, 1165 (2009). Prior to the decision of the U.S. Supreme Court, the case was called *Negusie v. Mukasey*. The name changed when, after Michael Mukasey, Eric H. Holder, Jr. became the Attorney General of the United States.

²⁵ See *id.* at 1164, 1167.

²⁶ See 8 U.S.C. § 1101(a)(42)(A); e.g., *In re Chen*, 20 I. & N. Dec. 16, 17 (B.I.A. 1989).

²⁷ See, e.g., *Chen*, 20 I. & N. Dec. at 17.

²⁸ *Lin v. INS*, 238 F.3d 239, 243–44 (3d Cir. 2001) (quoting *Chang v. INS*, 119 F.3d 1055, 1066 (3d Cir. 1997)).

²⁹ See, e.g., *In re Sanchez*, 19 I. & N. Dec. 276, 287–88 (B.I.A. 1985).

vice in a nation's military generally does not constitute persecution.³⁰ Similarly, fear of forced conscription into a guerilla organization by itself is not persecution.³¹ A person who fears punishment for desertion, however, may qualify for asylum if they can establish that they would have been compelled to perform an act that was illegal under international law.³² Thus, a former child soldier could establish persecution by showing that he or she deserted because others compelled him or her to commit atrocities.³³ But requiring child soldiers to prove that they committed atrocities, or would have been required to commit atrocities if they remained, misses the point: International law establishes that it is intrinsically wrong and detrimental to children's well-being to compel them to fight regardless of whether the fighting involves committing bad acts.³⁴

The next conundrum faced by child soldiers seeking asylum is that U.S. courts have declined to find that they were persecuted on account of a protected characteristic despite universal acknowledgement that they are victims of human rights abuses.³⁵ The BIA has defined "a particular social group"—the pertinent protected characteristic here—as "a group of persons [who] share a common, immutable characteristic" such as sex, color, kinship, or a shared past experience like "former military leadership or land ownership."³⁶ Consequently, some courts have held that age cannot form the basis for defining a social group because "unlike innate characteristics, such as sex or color, age changes over time, possibly lessening its role in personal identity."³⁷

³⁰ See, e.g., *M.A. v. INS*, 899 F.2d 304, 312 (4th Cir. 1990) (en banc); *In re A-G*, 19 I. & N. Dec. 502, 506 (B.I.A. 1987).

³¹ See *INS v. Elias-Zacarias*, 502 U.S. 478, 482 (1992).

³² See, e.g., *A-G*, 19 I. & N. Dec. at 506.

³³ See, e.g., *id.*

³⁴ See *infra* Part II.A.

³⁵ See *Lukwago v. Aschroft*, 329 F.3d 157, 183 (3d Cir. 2003); see also *supra* note 15 and accompanying text.

³⁶ *In re Acosta*, 19 I. & N. Dec. 211, 233 (B.I.A. 1985), *overruled in part by In re Mogharabi*, 19 I. & N. Dec. 439, 446 (B.I.A. 1987) (holding that to establish a social group, an applicant for asylum must show that: (1) he possesses a characteristic which the persecutor seeks to overcome in others; (2) the persecutor knows of the characteristic or could become aware of it; (3) the persecutor has the power to punish the characteristic; and (4) the persecutor has the inclination to punish the characteristic).

³⁷ *Lukwago*, 329 F.3d at 171. The *Lukwago* court declined to find that "children from Northern Uganda who are abducted and enslaved . . . and oppose their involuntary servitude" were a particular social group. *Id.* at 167. The court also rejected the argument that forced recruitment could be the basis for finding a social group because "a 'particular social group' must exist independently of the persecution suffered by the applicant for asylum." *Id.* at 172. In a subsequent decision regarding a victim of trafficking, the Third

This reasoning is flawed because it fails to acknowledge that at the time of the past persecution, the child's age was immutable.³⁸ Although each child will ultimately age out of the condition that makes them exploitable, "[a] child is clearly unable to disassociate him/herself from his/her age in order to avoid the persecution"³⁹ The U.S. courts' myopic view of age is also a consequence of federal regulations regarding the likelihood of future persecution.⁴⁰ The relevant regulations state that past persecution creates a presumption of future persecution, but that the government can overcome this presumption by showing that circumstances have changed such that an applicant who has suffered past persecution has no basis to fear future harm.⁴¹ Arguably, these "future persecution" regulations, which make granting asylum more difficult, are inapplicable: The statute expressly establishing "past persecution" as a basis for asylum makes no reference to risk of future harm.⁴² For example, there are several forms of harm, such as forced sterilization and female genital mutilation, that may form the basis of an asylum claim even though the harm cannot be repeated.⁴³ Further-

Circuit explained, "This is a matter of logic: motivation must precede action; and the social group must exist prior to the persecution if membership in the group is to motivate the persecution." *Sarkisian v. Attorney Gen. of the U.S.*, 322 F. App'x 136, 141 (3d Cir. 2009); *see also Cruz-Diaz v. INS*, 86 F.3d 330, 331-32 (4th Cir. 1996) (sustaining the immigration judge's determination that the forced conscription of the applicant by a rebel group when he was less than fifteen years old and his fear of arrest by the government was not based upon a protected ground). *But see In re S-E-G*, 24 I. & N. Dec. 579, 583-84 (B.I.A. 2008). In *S-E-G*, the Board stated,

We agree with the Immigration Judge that "youth" is not an entirely immutable characteristic but is, instead, by its very nature, a temporary state that changes over time. . . . [H]owever, . . . the mutability of age is not within one's control, and . . . if an individual has been persecuted in the past on account of an age-described particular social group, or faces such persecution at a time when that individual's age places him within the group, a claim for asylum may still be cognizable.

Id.

³⁸ *See* U.N. High Comm'r for Refugees, *Guidelines on International Protection: Child Asylum Claims under Articles 1(A)2 and 1(F) of the 1951 Convention and/or 1967 Protocol Relating to the Status of Refugees*, ¶ 49, U.N. Doc. HCR/GIP/09/08 (Dec. 22, 2009) [hereinafter UNHCR Guidelines].

³⁹ *Id.*

⁴⁰ *See* 8 C.F.R. § 208.13(b)(1)(i) (2010).

⁴¹ *See id.*

⁴² *See* DEBORAH E. ANKER, *LAW OF ASYLUM IN THE UNITED STATES* 44 (Paul T. Lufkin ed., 3d ed. 1999) (arguing that "an applicant who has suffered past persecution can still be denied asylum based on considerations of future harm" may impose requirements beyond what is required by statute).

⁴³ *See In re A-T*, 24 I. & N. Dec. 617, 622 (B.I.A. 2008).

more, federal regulations permit granting asylum on purely humanitarian grounds regardless of the possibility of future persecution if the past persecution was particularly egregious.⁴⁴

Despite these difficulties, child soldiers may still establish that they are members of a social group if they can show that they would be subject to persecution based upon their veteran status because that status is not subject to change.⁴⁵ For example, “membership in the group of former child soldiers who have escaped [Lord’s Resistance Army] captivity fits precisely within the BIA’s own recognition that a shared past experience may be enough to link members of a ‘particular social group.’”⁴⁶ This possible solution, however, leads to the following question: Are former child soldiers subject to exclusion from refugee protection because of their conduct as child soldiers?

II. CHILD SOLDIERS AND THE PERSECUTOR BAR

In the Refugee Act of 1980, Congress carved out an exception for those who “ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion.”⁴⁷ This seemingly clear language, however, is dangerously deceptive; at least one court has commented that the statute “has a smooth surface beneath which lie[s] a series of rocks.”⁴⁸

Until recently, courts interpreted the statute in light of the Supreme Court’s decision in *Fedorenko v. United States*, which upheld the denaturalization of Feodor Fedorenko, who had originally entered the United States as a refugee pursuant to the Displaced Persons Act (DPA) of 1948.⁴⁹ In both his application under the DPA and subsequent natu-

⁴⁴ See *In re S-A-K-*, 24 I. & N. Dec. 464, 465–66 (B.I.A. 2008).

⁴⁵ See *Lukwago*, 329 F.3d at 178–79. Jurists in Great Britain, however, have expressed skepticism as to whether a former child soldier would be recognized and hence subject to retribution when time would naturally alter his or her appearance. See *AJ (Liber.) v. Sec’y of State for the Home Dep’t*, [2006] EWCA (Civ) 1736, [¶ 3] (Eng.), available at <http://www.bailii.org/cw/cases/EWCA/Civ/2006/1736.html>.

⁴⁶ See *Lukwago*, 329 F.3d at 178. The Lord’s Resistance Army is “a rebel force that opposes the Ugandan government” and that has a “well-documented” practice of abducting children to serve as child soldiers. *Id.* at 164, 172.

⁴⁷ 8 U.S.C. § 1101(a)(42)(B) (2006).

⁴⁸ *Casteñeda-Castillo v. Gonzales*, 488 F.3d 17, 20 (1st Cir. 2007).

⁴⁹ See *Fedorenko v. United States*, 449 U.S. 490, 495 (1981). The DPA “specifically excluded individuals who had [either] ‘assisted the enemy in persecuting civil[ians]’ or had ‘voluntarily assisted the enemy forces . . . in their operations’” *Id.* (second alteration in original) (quoting Constitution of the International Refugee Organization, Annex I,

ralization application, Fedorenko willfully failed to disclose that he had served as a guard in the Treblinka concentration camp, which would have barred his entry into the United States under the DPA.⁵⁰ For his part, Fedorenko—who was initially a Russian prisoner of war but later served the Germans—admitted serving as a guard, but claimed that the Germans forced him to do so and denied any involvement in the atrocities committed at the camp.⁵¹

The Court refused to read a voluntariness exception into the DPA.⁵² Nevertheless, the Court noted that, without a voluntariness exception, the DPA would bar “every Jewish prisoner who survived Treblinka because each one of them assisted the SS in the operation of the camp.”⁵³ Specifically, the “working prisoners [who] led arriving prisoners to the lazaret where they were murdered, cut the hair of the women who were to be executed, or played in the orchestra at the gate to the camp as part of the Germans’ ruse to persuade new arrivals that the camp was other than what it was.”⁵⁴ In a critical footnote, the Court stated that the solution

lies, not in “interpreting” the Act to include a voluntariness requirement that the statute itself does not impose, but in focusing on whether particular conduct can be considered assisting in the *persecution* of civilians. Thus, an individual who did no more than cut the hair of female inmates before they were executed cannot be found to have assisted in the persecution of civilians. On the other hand, there can be no question that a guard who was issued a uniform and armed with a rifle and a pistol, who was paid a stipend and was regularly allowed to leave the concentration camp to visit a nearby vil-

Part II, § 2(a)–(b), *opened for signature* Dec. 15, 1946, 62 Stat. 3037, 18 U.N.T.S. 3 [hereinafter IRO Constitution]).

⁵⁰ *Fedorenko*, 449 U.S. at 500.

⁵¹ *See id.*

⁵² *Id.* at 512–14. In denying Fedorenko’s involuntariness defense, the Court took notice of the difference between the two statutory preclusions for eligibility under the DPA. *See id.* at 512. Whereas section 2(a) precluded those who “assisted the enemy in persecuting civil[ians],” section 2(b) precluded those who “*voluntarily* assisted the enemy forces . . . in their operations . . .” *See id.* at 509–10, 512 (alteration in original) (quoting IRO Constitution, *supra* note 49, Annex I, Part II, § 2(a)–(b)) (internal quotation marks omitted). The Court held that the omission of the word “voluntarily” from section 2(a) meant that all persons who assisted the enemy in persecution were ineligible, regardless of voluntariness. *See id.*

⁵³ *See id.* at 511 n.33 (quoting *United States v. Fedorenko*, 455 F. Supp. 893, 913 (S.D. Fla. 1978), *rev’d*, 597 F.2d 946 (5th Cir. 1979), *aff’d*, 449 U.S. 490 (1981)).

⁵⁴ *Id.*

lage, and who admitted to shooting at escaping inmates on orders from the commandant of the camp, fits within the statutory language about persons who assisted in the persecution of civilians.⁵⁵

While *Fedorenko* seemingly requires a straightforward line-drawing analysis where the court need only determine whether an individual's conduct advanced the group's persecutory goals, courts have struggled to find the boundary "between the extremes of the death camp barber and the weapon wielding guard."⁵⁶ One view holds that *Fedorenko* requires that "in assessing the character of the individual's conduct, we look not to the voluntariness of the person's actions, but to his behavior as a whole. Where the conduct was active and had direct consequences for the victims, we conclude that it was 'assistance in persecution.'"⁵⁷ Under this approach, it is purely the objective effect on the victim that counts. For example, the Fifth Circuit held in *Bah v. Ashcroft* that where the alien admitted to killing a prisoner and chopping off the hands of civilians, his personal motivation was not relevant even though he was forced to join a rebel group after the group had murdered his father and sister and threatened him with death.⁵⁸

⁵⁵ *Fedorenko*, 449 U.S. at 512 n.34. Following *Fedorenko*'s denaturalization, the government brought a second action to deport him under the Holtzman Amendment to the Immigration and Naturalization Act (INA) as one who had assisted the Nazis in the persecution of others. See 8 U.S.C. § 1227(a)(4)(D) (2006); *In re Fedorenko*, 19 I. & N. Dec. 57, 59–60 (B.I.A. 1984). Although *Fedorenko* argued that the statutory issue present in his denaturalization under the DPA was not present in his deportation under the INA, the Board held that his motivation was irrelevant to his deportation. See *Fedorenko*, 19 I. & N. Dec. at 69.

⁵⁶ *United States v. Sprogis*, 763 F.2d 115, 121 (2d Cir. 1985) (holding that a Latvian police officer who performed various ministerial duties for the Nazis was not a persecutor); cf. *Maikovskis v. INS*, 773 F.2d 435, 447–48 (2d Cir. 1985) (finding that a Latvian police chief who ordered arrests at the direction of the Nazis was a persecutor).

⁵⁷ *Xie v. INS*, 434 F.3d 136, 142–43 (2d Cir. 2006) (finding that a driver for the Chinese health department was a persecutor where one of his duties was to drive pregnant women to hospitals for forced abortions). Mere membership in an organization that persecutes others on account of a protected ground, however, is insufficient to bar relief unless "one's actions or inaction furthers that persecution in some way." *In re Rodriguez-Majano*, 19 I. & N. Dec. 811, 814–15 (B.I.A. 1988). Nevertheless, one does not have to actually pull the trigger to further the group's persecutory intent. See *In re A-H-*, 23 I. & N. Dec. 774, 784–85 (B.I.A. 2005) (finding that a political movement's leader-in-exile may have "incited," "assisted," or "participated in" acts of persecution in the home country by an armed group connected to that political movement). At the very least, the person has to know that his conduct furthers persecution. See *Casteñeda-Castillo*, 488 F.3d at 22 (holding that the persecutor bar would presumptively not apply to a former army officer who testified—and whose testimony was believed—that he was unaware of a civilian massacre during a military operation in which he was ordered to block escape routes from the village).

⁵⁸ See *Bah v. Ashcroft*, 341 F.3d 348, 351 (5th Cir. 2003).

Alternatively, the Eighth Circuit has held that *Fedorenko* requires “a particularized evaluation in order to determine whether an individual’s behavior was culpable to such a degree that he could be fairly deemed to have assisted or participated in persecution.”⁵⁹ In *Hernandez v. Reno*, the court found that even when an asylum applicant, who had been forcibly conscripted into a rebel group, participated in a firing squad that killed one hundred villagers suspected of supporting the government, he may have not persecuted others.⁶⁰ In reaching this conclusion, the court contrasted the circumstances of Hernandez’s conduct with Fedorenko’s conduct.⁶¹ The court noted that Fedorenko was at times free to leave Treblinka and never tried to escape, served over one year, was paid and rewarded, outnumbered the Germans (with the other Ukrainian guards), and lied about his service to U.S. authorities.⁶² On the contrary, Hernandez was never granted leave, escaped at the earliest opportunity, received no pay, risked his life in opposing the group’s tactics and refusing orders, was isolated, and fully revealed his involvement to U.S. officials.⁶³

No reported cases, however, have directly dealt with the proper application of the *Fedorenko* analysis to child soldiers. To the limited extent that the Board has considered the issue, it has done so in non-precedential, unpublished decisions that cleave toward *Hernandez*.⁶⁴ One Board member opined that in considering the claim of a child soldier, factors relevant in determining his culpability include “his age at the time of the events in question, the threats and coercion he faced from adult superiors, his fear of being killed should he have refused to act as ordered, and his candid and honest testimony about his involvement in the deaths of . . . civilians.”⁶⁵ Another Board member has found that,

because the respondent was a boy between the ages of 11 and 13 during the relevant period, we are not persuaded that he

⁵⁹ *Hernandez v. Reno*, 258 F.3d 806, 813 (8th Cir. 2001).

⁶⁰ *See id.* at 815 (remanding to the BIA with instructions to apply the *Fedorenko* analysis to determine whether the asylum applicant had assisted in the persecution of others).

⁶¹ *See id.* at 814.

⁶² *See id.*

⁶³ *See id.*

⁶⁴ *See, e.g.,* *Sackie v. Ashcroft*, 270 F. Supp. 2d 596, 600 (E.D. Pa. 2003) (discussing an unpublished BIA decision which concluded that the “[p]etitioner did not participate or assist in the persecution of others”); *In re E-O*, slip op. at 1 (B.I.A. July 12, 2006) (unpublished decision) (on file with author); *In re Kebede*, 26 Immig. Rptr. B1-170, B1-178 (B.I.A. Feb. 20, 2003) (Espinoza, J., concurring).

⁶⁵ *Kebede*, 26 Immig. Rptr. at B1-178.

had the requisite personal culpability for ordering, inciting, assisting, or otherwise participating in the persecution of others on account of a protected ground as a former child soldier in the [Lord's Resistance Army].⁶⁶

In another decision, the Board held that a child soldier was not a persecutor simply because of duress.⁶⁷ For its part, DHS has conceded that child soldiers present a different scenario from that of adults, albeit one requiring resolution by Congress.⁶⁸

In March 2009, the Supreme Court finally clarified that *Fedorenko* was not controlling with respect to the persecutor bar because it involved a completely different statutory scheme.⁶⁹ In *Negusie v. Holder*, the Court held that the Immigration and Nationality Act's persecutor bar was ambiguous with respect to "whether coercion or duress is relevant in determining if an alien assisted or otherwise participated in persecution," and that *Chevron* deference required that the agency address the issue in the first instance.⁷⁰ Concurring in the judgment, Justice Scalia noted that the agency could retain a rule precluding a voluntariness defense.⁷¹ Justice Stevens dissented, finding that a duress exception was necessary for the United States to comply with the U.N. High Commissioner for Refugees' (UNHCR) interpretation of the U.N. Convention Relating to the Status of Refugees.⁷²

So the question remains: Can a child soldier be guilty of persecuting others? *Negusie* presents the BIA with a clean slate on which it may draft an answer.⁷³ Even if the Board follows Justice Scalia's observation that it may be reasonable to interpret the term "persecution" so as to

⁶⁶ *E-O*, slip op. at 1.

⁶⁷ See *Sackie*, 270 F. Supp. 2d at 600 (discussing BIA decision).

⁶⁸ See Brief for the Respondent at 24 n.18, *Negusie v. Holder*, 129 S. Ct. 1159 (2009) (No. 07-499).

⁶⁹ See *Negusie*, 129 S. Ct. at 1166.

⁷⁰ *Id.* at 1164.

⁷¹ See *id.* at 1169–70 (Scalia, J., concurring). Justice Scalia offered three reasons for doing so: First, "[t]he culpability of one who harms another under coercion is, and has always been, a subject of intense debate, raising profound questions of moral philosophy and individual responsibility" and duress is not a defense to intentional killings in common law or for soldiers following military orders they know are unlawful. *Id.* at 1169. Second, "in the context of immigration law, 'culpability' as a relevant factor in determining admissibility is only one facet of a more general consideration: desirability. And there may well be reasons to think that those who persecuted others, even under duress, would be relatively undesirable as immigrants." *Id.* Finally, "a bright-line rule excluding all persecutors—whether acting under coercion or not—might *still* be the best way for the agency to effectuate the statutory scheme." *Id.*

⁷² See *id.* at 1175 (Stevens, J., dissenting).

⁷³ See *id.* at 1167 (majority opinion).

exclude a voluntariness exception, as a general matter, child soldiers present a unique case where a per se bar would contradict both interpretations of international law by the United States as well as domestic legislation.⁷⁴

A. *A Per Se Bar to Asylum for Child Soldiers Would Contradict the United States' Adherence to the International View That Child Soldiers Are Victims of Human Rights Abuse*

Since 1924, international law has recognized the vulnerability of children and has afforded them special rights and protections during times of armed conflict.⁷⁵ It was not until the two 1977 Additional Protocols to the Geneva Conventions, however, that international law specifically addressed children as combatants.⁷⁶ Protocol I established that “[c]hildren shall be the object of special respect and shall be protected against any form of indecent assault” and prohibited the involvement of children in international conflicts.⁷⁷ Protocol II extended this principle to non-international armed conflict such as civil wars, and states, “Children who have not attained the age of fifteen years shall neither be recruited in the armed forces or groups nor allowed to take part in hostilities.”⁷⁸

⁷⁴ See *Negusie*, 129 S. Ct. at 1168–69 (Scalia, J., concurring); see also Child Soldiers Accountability Act of 2008, Pub. L. No. 110-340, § 2, 122 Stat. 3735, 3735 (codified as amended at 18 U.S.C.A. § 2442 (West Supp. 2010)); U.S. Report on the Optional Protocol, *supra* note 18, ¶ 34; Happold, *supra* note 13, at 64; *supra* notes 16–18 and accompanying text.

⁷⁵ See Mark Ensaraco, *The Rights of the Child to Development*, in CHILDREN'S HUMAN RIGHTS: PROGRESS AND CHALLENGES FOR CHILDREN WORLDWIDE 9, 10 (Mark Ensaraco & Linda C. Majka eds., 2005); Geraldine Van Bueren, *The International Legal Protection of Children in Armed Conflicts*, 43 INT'L & COMP. L.Q. 809, 810–11 (1994). To the extent that protection was afforded to children, it was as a vulnerable segment of society and not as participants in war. See Ensaraco, *supra*, at 10; Van Bueren, *supra*, at 810–11. For example, the Geneva Convention of 1949 contains several specific provisions granting children certain privileges by reason of age in times of armed conflict. See Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 51, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Fourth Geneva Convention] (excluding persons under eighteen from enlistment or forced labor by occupying power); see also Alison Dundes Renteln, *The Child Soldier: The Challenge of Enforcing International Standards*, 21 WHITTIER L. REV. 191, 193 (1999).

⁷⁶ See Renteln, *supra* note 75, at 193.

⁷⁷ Geneva Protocol I, *supra* note 10, art. 77(1)–(3). Protocol I is now considered to reflect customary international law. See Renteln, *supra* note 75, at 194.

⁷⁸ Geneva Protocol II, *supra* note 15, art. 4(3)(c); see Renteln, *supra* note 75, at 193–94. Many states, however, deny the applicability of Protocol I to their internal conflicts by arguing that they are mere domestic disturbances. See ILENE COHN & GUY S. GOODWIN-GILL, CHILD SOLDIERS: THE ROLE OF CHILDREN IN ARMED CONFLICT 60 (1994); Renteln, *supra* note 75, at 194.

The Convention on the Rights of the Child (CRC) also sets the minimum age for acceptable recruitment into the armed forces at fifteen.⁷⁹ Similarly, the Rome Statute of the International Criminal Court (ICC) declares that “[c]onscripting or enlisting children under the age of fifteen years into the national armed forces or using them to participate actively in hostilities” constitutes a “war crime.”⁸⁰ Further, the International Labour Organization Convention on the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labor defines the worst forms of child labor to include “[a]ll forms of slavery or practices similar to slavery, such as the sale and trafficking of children, debt bondage and serfdom and forced or compulsory labour, including forced or compulsory recruitment of children for use in armed conflict.”⁸¹ Finally, in 2000, the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict required that “States Parties . . . take all feasible measures” to prevent soldiers under eighteen years old from taking part in combat.⁸² The Optional Protocol also prohibits compulsory service in government forces by persons under eighteen and raises the minimum age for voluntary recruitment “from that set out in article 38, paragraph 3, of the Convention on the Rights of the Child,” which is fifteen.⁸³ Thus, the Optional Protocol “raises the minimum age of recruitment [into government forces] to sixteen, if in a rather opaque manner.”⁸⁴ Non-government armed groups are barred from recruiting those under eighteen under any circumstance.⁸⁵ Finally, the Optional Protocol also

⁷⁹ See CRC, *supra* note 10, art. 38. While fifteen years is the minimum age for recruitment into the armed forces, states are urged to give priority to the oldest individuals. See *id.*

⁸⁰ Rome Statute of the International Criminal Court art. 8(2)(b)(xxvi), *adopted* July 17, 1998, 2187 U.N.T.S. 90 (entered into force July 1, 2002) [hereinafter Rome Statute].

⁸¹ Worst Forms of Child Labour Convention, *supra* note 15, art. 3(a). Although not directed specifically toward child soldiers, treaties aimed at the eradication of slavery and human trafficking encompass the child soldier phenomenon, including the International Covenant on Civil and Political Rights; the International Covenant on Economic, Social and Cultural Rights; the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; the Convention Against Transnational Organized Crime; and the Protocol to Prevent, Suppress, and Punish Trafficking in Persons. See Tiefenbrun, *supra* note 11, at 449–56; see also P.W. Singer, *Talk Is Cheap: Getting Serious About Preventing Child Soldiers*, 37 CORNELL INT’L L.J. 561, 568–70 (2004).

⁸² Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, *supra* note 10, Annex I, art. 1.

⁸³ *Id.* Annex I, arts. 2, 3(1).

⁸⁴ Happold, *supra* note 13, at 66.

⁸⁵ See Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, *supra* note 10, Annex I, art. 4(1).

obliges States Parties to cooperate in the “rehabilitation and social reintegration” of persons recruited in a manner contrary to the protocol.⁸⁶

While not a party to the 1977 Additional Protocols to the Geneva Conventions, the United States has indicated that it considers their provisions relating to children in armed conflict to reflect customary international law.⁸⁷ More importantly, the United States has ratified both the Optional Protocol and Worst Forms of Child Labour Conventions—the two primary treaties prohibiting the forced recruitment of child soldiers.⁸⁸ Thus, the United States recognizes child soldiers as victims of human rights abuses and crimes as a matter of domestic law.⁸⁹

Further, in October 2008, Congress enacted the Child Soldiers Accountability Act which amends the Immigration and Nationality Act to declare any alien who has engaged in the recruitment or use of child soldiers removable.⁹⁰ Significantly, when introducing the Act, Senator Richard Durbin stated:

⁸⁶ *Id.* Annex I, art. 7(1). The international community’s efforts to outlaw the exploitation of child soldiers finally obtained some level of credibility on January 29, 2007, when the International Criminal Court (ICC) initiated its first war crime trial based on the forced recruitment of children against Congolese warlord Thomas Lubanga Dyilo. *See* Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06, Decision on the Confirmation of Charges, ¶¶ 9–11 (Jan. 29, 2007), <http://www.icc-cpi.int/iccdocs/doc/doc266175.pdf>. The Special Court for Sierra Leone’s conviction of three former commanders of the Armed Forces Revolutionary Council for the illegal recruitment and abuse of child soldiers represented another milestone. *See* Prosecutor v. Alex Tamba Brima, Case No. SCSL-2004-16-A, Judgment, ¶ 14(iii) (Feb. 22, 2008), <http://www.sc-sl.org/cases/ProsecutorBrimaKamaraandKanuAFRCCCase/AppealJudgment/tabid/216/default.aspx>. The Special Court for Sierra Leone was established pursuant to U.N. Security Council resolution. *See* U.N. Secretary-General, *The Establishment of a Special Court for Sierra Leone: Rep. of the Secretary-General*, ¶ 1, U.N. Doc. S/2000/915 (Oct. 4, 2000) [hereinafter *Sierra Leone Special Court Report*].

⁸⁷ *See* Happold, *supra* note 13, at 63; *see also* Martin D. Dupuis et al., *The Sixth Annual American Red Cross-Washington College of Law Conference on International Humanitarian Law: A Workshop on Customary International Law and the 1977 Protocols Additional to the 1949 Geneva Conventions*, 2 AM. U.J. INT’L L. & POL’Y 415, 420 (1987) (Remarks of Michael J. Matheson).

⁸⁸ Happold, *supra* note 13, at 63–64; *see also* Press Release, U.S. Dep’t of State, *supra* note 16; Press Release, Int’l Labour Org., U.S. Ratifies ILO Convention Against the Worst Forms of Child Labour (Dec. 2, 1999), http://www.ilo.org/global/About_the_ILO/Media_and_public_information/Press_releases/lang-en/WCMS_071320/index.htm. The U.S. Senate ratified the Worst Forms of Child Labor Convention on December 2, 1999 and the Optional Protocol on December 23, 2002. *See* Press Release, U.S. Dep’t of State, *supra* note 16; Press Release, Int’l Labour Org., *supra*.

⁸⁹ *See* Happold, *supra* note 13, at 63–64; *see also* Press Release, Int’l Labour Org., *supra* note 88; Press Release, U.S. Dep’t of State, *supra* note 16.

⁹⁰ *See* Child Soldiers Accountability Act of 2008, Pub. L. No. 110-340, § 2, 122 Stat. 3735, 3735 (codified as amended at 18 U.S.C.A. § 2442 (West Supp. 2010)); *see also* 154 CONG. REC. S8513 (daily ed. Sept. 15, 2008) (statement of Sen. Durbin).

Recognizing that perpetrators often use drugs, threats, violence or other means to pressure child soldiers into committing serious human rights violations, including the recruitment of other children, this legislation seeks to hold adults accountable for their actions and is not intended to make inadmissible or deportable child soldiers who participated in the recruitment of other children. This legislation should not be interpreted as placing new restrictions on or altering the legal status of former child soldiers who are seeking admission to or are already present in the United States.⁹¹

The Act also criminalizes the recruitment of children under the age of fifteen and allows the United States to prosecute individuals in the United States who have recruited children, even if the recruitment took place in other countries.⁹²

Similarly, because “[c]hild soldiers are children who are trafficked into exploitative and dangerous forms of work performed under slave-like conditions,” former child soldiers trafficked into the United States would be protected under the Trafficking Victims Protection Act (TVPA).⁹³ The TVPA defines trafficking victims as persons who are held against their will “for labor or services, through the use of force, fraud, or coercion for the purpose of subjection to involuntary servitude, peonage, debt bondage, or slavery.”⁹⁴ Moreover, state anti-human trafficking laws, such as that of New York, specifically exclude trafficking victims from prosecution as accomplices.⁹⁵ This creates a potential conflict of laws.⁹⁶ It is well established that “[w]here the statute in question was enacted for the protection of certain defined persons thought to be in need of special protection, it would clearly be contrary to the legislative purpose to impose accomplice liability upon such a person.”⁹⁷ This evi-

⁹¹ 154 CONG. REC. S8514 (daily ed. Sept. 15, 2008) (statement of Sen. Durbin).

⁹² See Child Soldiers Accountability Act of 2008 § 2.

⁹³ See Tiefenbrun, *supra* note 11, at 449.

⁹⁴ 22 U.S.C. § 7102(8)(B) (2006); see Tiefenbrun, *supra* note 11, at 452.

⁹⁵ See, e.g., N.Y. PENAL LAW § 135.36 (McKinney 2009) (“In a prosecution for labor trafficking, a person who has been compelled or induced or recruited, enticed, harbored or transported to engage in labor shall not be deemed to be an accomplice.”).

⁹⁶ Compare Child Soldiers Accountability Act of 2008 § 2 (imposing liability on persons who attempt or conspire to recruit child soldiers), with Tiefenbrun, *supra* note 11, at 449 (noting that the TVPA protects victims of trafficking), and PENAL § 135.36 (excluding victims of trafficking from liability as accomplices).

⁹⁷ WAYNE R. LAFAVE, CRIMINAL LAW 693 (4th ed. 2003). Thus, a woman willingly transported across state lines for the purpose of prostitution cannot be charged as an accomplice in violation of the Mann Act. See *Gebardi v. United States*, 287 U.S. 112, 118–20, 123 (1932). Nor can a victim of statutory rape be an accomplice to that crime. See *In re Meagan R.*, 49 Cal.

dence overwhelmingly suggests that Congress has recognized child soldiers as a protected class.

B. *A Per Se Bar to Asylum for Child Soldiers Does Not Conform
with the Refugee Protocol*

The principles of refugee protection that underlie the Refugee Convention and Protocol are subject to limited exceptions contained in Article 1F of the Convention.⁹⁸ These exceptions aim to exclude from refugee protection those persons who have committed offenses so grave that they are considered undeserving of safe harbor.⁹⁹ Article 1F provides, in pertinent part:

The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that:

- (a) he has committed a crime against peace, a war crime, or a crime against humanity . . . ;
- (b) he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee;
- (c) he has been guilty of acts contrary to the purposes and principles of the United Nations.¹⁰⁰

According to the interpretation of the UNHCR, the third exception for acts contrary to the purposes of the United Nations applies only to persons in high positions of authority representing a state or state-like

Rptr. 2d 325, 330 (Cal. Ct. App. 1996). Similarly, it is well established within the civil context that “if conduct is made criminal in order to protect a certain class of persons irrespective of their consent, the consent of members of that class to the conduct is not effective to bar a tort action.” *Doe v. Oberweis Dairy*, 456 F.3d 704, 713 (7th Cir. 2006) (quoting RESTATEMENT (SECOND) OF TORTS § 892C (1986)).

⁹⁸ See Convention Relating to the Status of Refugees art. 1F, July 28, 1951, 189 U.N.T.S. 150.

⁹⁹ See *id.*; see also UNHCR Guidelines, *supra* note 38, ¶ 58; Advisory Opinion from Eduardo Arboleda, Deputy Regional Representative, U.N. High Commissioner for Refugees 5–6 (Sept. 12, 2005) [hereinafter Advisory Opinion] (on file with author).

¹⁰⁰ Convention Relating to the Status of Refugees, *supra* note 98, art. 1F. The grounds for exclusion enumerated in article 1F are exhaustive, meaning that they cannot be augmented by additional grounds for exclusion in the absence of an international convention to that effect. See UNHCR Guidelines, *supra* note 38, ¶ 58. Moreover, the language of article 1F suggests that states lack the discretion to grant protection to persons to whom the preclusion applies. See Convention Relating to the Status of Refugees, *supra* note 98, art. 1F; see also Happold, *supra* note 13, at 85 (discussing the discrepancies in the treatment of child soldiers in international and domestic law).

entity.¹⁰¹ The exclusion for “serious non-political crimes” is also inapplicable to child soldiers, unless the crime was linked to the armed conflict itself.¹⁰² Therefore, the exclusion for war crimes and crimes against humanity under Article 1F(a) is the most relevant in determining whether a child soldier committed an excludable act during an armed conflict.¹⁰³

War crimes, referred to as “grave breaches,” are serious violations of the laws and customs of war as provided under the Geneva Conventions of 1949.¹⁰⁴ They include willful killing and torture, willfully causing great suffering or serious injury to body or health, hostage taking, wanton destruction of civilian settlements, launching indiscriminate attacks on civilians, forced transfer of populations, and rape.¹⁰⁵ Crimes against humanity include murder, extermination, enslavement, deportation or forcible transfer, imprisonment, torture, rape and other forms of sexual violence, persecution, enforced disappearance, and apartheid.¹⁰⁶ War crimes and crimes against humanity do not require proof of specific intent, merely the knowledge of the existence of particular circumstances.¹⁰⁷ Thus, to obtain a conviction for war crimes, prosecutors need only show that the defendant engaged in the proscribed conduct with knowledge that he or she did so within the context of an armed conflict.¹⁰⁸ Crimes against humanity require knowledge that the prohibited conduct was part of an ongoing, systematic attack against civilian populations.¹⁰⁹

The sad reality is that child soldiers commit atrocious acts with disturbing regularity.¹¹⁰ Normally, these acts would unquestionably be deemed war crimes and crimes against humanity and thus grounds for

¹⁰¹ See Advisory Opinion, *supra* note 99, at 7. Some commentators have argued that a child soldier simply cannot form the intent necessary to commit genocide or to wage a war of aggression. See Happold, *supra* note 13, at 72; Chen Reis, *Trying the Future, Avenging the Past: The Implications of Prosecuting Children For Participating in Internal Armed Conflict*, 28 COLUM. HUM. RTS. L. REV. 629, 644–45 (1997).

¹⁰² Advisory Opinion, *supra* note 99, at 7.

¹⁰³ See *id.* at 6.

¹⁰⁴ See Fourth Geneva Convention, *supra* note 75, art. 147.

¹⁰⁵ See Geneva Protocol II, *supra* note 15, art. 4(2); Geneva Protocol I, *supra* note 10, art. 85(3); Fourth Geneva Convention, *supra* note 75, art. 147.

¹⁰⁶ See Charter of the International Military Tribunal art. 6(c), Aug. 8, 1945, 59 Stat. 1544, 82 U.N.T.S. 284.

¹⁰⁷ See Happold, *supra* note 13, at 72.

¹⁰⁸ See Rome Statute, *supra* note 80, art. 8(2)(a); see also CLAIRE DE THAN & EDWIN SHORTS, INTERNATIONAL CRIMINAL LAW AND HUMAN RIGHTS 121–23, 137–38 (2003).

¹⁰⁹ See Rome Statute, *supra* note 80, art. 7(1); see also DE THAN & SHORTS, *supra* note 108, at 115.

¹¹⁰ See MICHAEL WESSELLS, CHILD SOLDIERS: FROM VIOLENCE TO PROTECTION 2–3 (2006); Tiefenbrun, *supra* note 11, at 433–34.

exclusion if committed by adults.¹¹¹ But should child soldiers be held accountable for war crimes or crimes against humanity and therefore be subject to the exclusion provisions of Article 1F(a)?

Although the international community has clearly and vigorously condemned the use of child soldiers, its approach to the treatment of child soldiers in light of their conduct remains ambiguous.¹¹² While international law clearly establishes that the forced recruitment of a child soldier violates that child's rights, it is largely silent as to the culpability of a child soldier for his violation of international laws during the period in which his rights were violated.¹¹³ Understandably, the victims of the brutality of child soldiers are less ambiguous in their view of how child soldiers should be treated.¹¹⁴ Child soldiers have been tried in the domestic courts of several nations and even executed for crimes in violation of national laws committed during armed conflicts.¹¹⁵ Popular opinion in Rwanda maintained that "if a child was able to kill, if a child was able to discriminate between two ethnic groups, to decide who was a Hutu moderate and who wasn't, and was able to carry out murder in that way, why should that child be considered differently from an adult?"¹¹⁶

¹¹¹ See Convention Relating to the Status of Refugees, *supra* note 98, art. 1F; Charter of the International Military Tribunal, *supra* note 106, art. 6(b)–(c).

¹¹² See Jennifer C. Everett, *The Battle Continues: Fighting for a More Child-Sensitive Approach to Asylum for Child Soldiers*, 21 FLA. J. INT'L L. 285, 298–99 (2009); Happold, *supra* note 13, at 78–79; Renteln, *supra* note 75, at 199–200.

¹¹³ See Happold, *supra* note 13, at 67. There is no internationally recognized minimum age of criminal responsibility, much less one for the violation of international law. See *id.* at 78–79. Rather, the CRC requires member states to establish their own minimum age for criminal responsibility. See CRC, *supra* note 10, art. 40(3)(a); Happold, *supra* note 13, at 73. While the ICC does not have jurisdiction over any person who was under the age of eighteen at the time of the alleged commission of the offense, this is merely a jurisdictional provision; it does not preclude prosecution in a national court. See Happold, *supra* note 13, at 78–79. The statutes for the international criminal tribunals for the former Yugoslavia and Rwanda were both silent as to a minimum age of criminal responsibility, though neither tribunal prosecuted anyone under eighteen. See *id.* Further, while the CRC requires states parties to establish a minimum age of criminal responsibility, it does not set an age itself—each state is left to establish its own threshold age for criminal responsibility. See CRC, *supra* note 10, art. 40(3)(a).

¹¹⁴ See WESSELLS, *supra* note 110, at 218–19; Reis, *supra* note 101, at 634–35.

¹¹⁵ See Happold, *supra* note 13, at 71. The government of the Democratic Republic of Congo executed a fourteen-year-old child soldier in 2000 and sentenced four others between the ages of fourteen and sixteen to death in 2001. *Id.* In 2002, the Ugandan government charged two child soldiers from the Lord's Resistance Army with treason but withdrew the charges under international pressure. See *id.*

¹¹⁶ Reis, *supra* note 101, at 634–35. In Rwanda, over one thousand children were detained by national authorities and accused of participating in the genocide. See *id.* at 629.

Dr. Matthew Happold has argued, however, that because Protocol II sets fifteen as the cut off age for military service, a fifteen-year-old should not be held accountable for his actions.¹¹⁷ After all,

The right held by children under fifteen, not to be recruited into an armed force or group, is a welfare right based on the premise that military service, even if voluntary, is always contrary to their best interests. In consequence, the interests the right serves trump any autonomy interests that might be served by permitting children under fifteen the choice whether or not to volunteer.¹¹⁸

Dr. Happold concedes, however, that the problem with this premise is that Protocol II makes no mention of a child soldier's criminal responsibility and the drafters of Protocol II specifically decided not to include such a provision.¹¹⁹

Nonetheless, this idea that children under fifteen lack the mental capacity to decide to serve, and thus cannot form the mental state required to commit international crimes, seems to have influenced the formation of the Special Court for Sierra Leone, which has no jurisdiction over anyone who was under fifteen years of age at the time of the commission of an offense.¹²⁰ Those between fifteen and eighteen were to be

treated with dignity and a sense of worth, taking into account his or her young age and the desirability of promoting his or her rehabilitation, reintegration into and assumption of a constructive role in society, and in accordance with international human rights standards, in particular the rights of the child.¹²¹

The Special Court's prosecutor quickly announced, however, that he would not indict persons who committed crimes as children.¹²²

¹¹⁷ See Happold, *supra* note 13, at 69.

¹¹⁸ *Id.*

¹¹⁹ See *id.* at 73–74.

¹²⁰ See Sierra Leone Special Court Report, *supra* note 86, ¶¶ 32–38.

¹²¹ Statute of the Special Court for Sierra Leone art. 7(1), Jan. 16, 2002, 2178 U.N.T.S. 145.

¹²² See Press Release, Special Court for Sierra Leone Pub. Affairs Office, Special Court Prosecutor Says He Will Not Prosecute Children (Nov. 2, 2002), <http://www.sc-sl.org/LinkClick.aspx?fileticket=XRwCUc%2BaVhw%3D&tabid=196>. Instead, "Children implicated in particularly heinous crimes are given hearings in special closed juvenile chambers (to keep their identity secret) and receive psychological counseling and other forms of assistance." Singer, *supra* note 81, at 580. "Rather than having to serve sentences in prisons

In sum, although it is theoretically possible for a child soldier to be found guilty of committing crimes that would subject him to exclusion under Article 1F(a), it does not occur in practice.¹²³ Even if evidence indicated that a child soldier committed war crimes, the UNHCR has warned that any refugee status determination related to child soldiers must “take into account not only general exclusion principles but also the rules and principles that address the special status, rights, and protection afforded to children under international and national law at all stages of the asylum procedure.”¹²⁴ These include, most notably, principles relating to “the mental capacity of children and their ability to understand and consent to the acts that they are requested or ordered to undertake.”¹²⁵ For fifteen- to eighteen-year-old child soldiers, the UNHCR notes that questions of immaturity, involuntary intoxication, duress, and self-defense arise in assessing culpability.¹²⁶

Finally, even if it was determined that a child soldier had committed an excludable act and that he or she bore individual responsibility for that act, the UNHCR requires the tribunal to determine whether the consequences of exclusion from refugee protection are proportional to the seriousness of the excludable acts.¹²⁷ The proportionality determination requires consideration of any mitigating or aggravating factors including age, treatment by military personnel, or circumstances of service.¹²⁸

with adult perpetrators, they are placed in special custody, rehabilitation or demobilization programs, and foster care.” *Id.*

¹²³ See Happold, *supra* note 13, at 77–78.

¹²⁴ UNHCR Guidelines, *supra* note 38, ¶ 63.

¹²⁵ *Id.*

¹²⁶ See *id.* ¶ 64. Although the International Criminal Tribunal for the former Yugoslavia rejected the duress defense for war crimes and crimes against humanity in *Prosecutor v. Drazen Erdemović*, duress is a defense under the Rome Statute establishing the ICC. See Case. No. IT-96-22-A, Judgment, ¶ 19 (Int’l Crim. Trib. for the Former Yugoslavia Oct. 7, 1997), <http://www.icty.org/x/cases/erdemovic/acjug/en/erd-aj971007e.pdf>; see also Rome Statute, *supra* note 80, art. 31(1)(d). “As stated at the Nuremberg Trials, an individual who is compelled against his will based on an ‘imminent, real and inevitable’ threat to his life, to engage in an act morally repulsive to him, lacks the requisite *mens rea* to commit a crime.” Advisory Opinion, *supra* note 99, at 9.

¹²⁷ See UNHCR Guidelines, *supra* note 38, ¶ 64.

¹²⁸ See *id.*

*C. A Per Se Bar to Asylum for Child Soldiers Ignores Traditional Notions of
Infancy and Duress as a Basis for Finding Diminished Responsibility
for Children Who Commit Bad Acts*

Recent studies demonstrate that “critical areas in the brain[’s] [frontal lobes] used for making judgments and comprehending complex concepts like safety and freedom are not fully developed” until people are in their twenties.¹²⁹ These studies confirm “a long-held, common sense view: teenagers are not the same as adults in a variety of key areas such as the ability to make sound judgments when confronted by complex situations, the capacity to control impulses, and the ability to plan effectively.”¹³⁰ Ahead of this scientific curve, the Supreme Court has long recognized that “[o]ur history is replete with laws and judicial recognition that minors, especially in their earlier years, generally are less mature and responsible than adults.”¹³¹ In particular, the Court has noted the “lack of maturity and an underdeveloped sense of responsibility” in youth, that the young are “more vulnerable or susceptible to negative influences and outside pressures,” and that “the character of a juvenile is not as well formed as that of an adult.”¹³² Such considerations lead to the conclusion that “[t]heir own vulnerability and comparative lack of control over their immediate surroundings mean juveniles have a greater claim than adults to be forgiven for failing to escape negative influences in their whole environment.”¹³³

The idea that children should also be held to a lesser degree of responsibility than adults is reflected in the various sections of the Immigration and Nationality Act (INA) that exempt children from otherwise generally applicable provisions.¹³⁴ For example, the totalitarian party membership ground of inadmissibility has an age-based excep-

¹²⁹ See Don Vereen, *Research Shows Consequences of Drug Abuse on the Teenage Brain*, 14 CHALLENGE, No. 3, 2007, at 1, http://www.thechallenge.org/challenge_14_3.pdf; see also Catherine Sebastian, *The Second Decade: What Can We Do About the Adolescent Brain?*, 2 OPTICON 1826, at 2 (2007), http://www.ucl.ac.uk/opticon1826/archive/issue2/VIPLIFE_Teenagers.pdf (reporting that “the most profound differences between adults and adolescents occur at the decision-making, or executive, levels of processing” and that adolescents are more likely than adults to engage in risky behavior).

¹³⁰ Daniel R. Weinberger, Brita Elvevåg & Jay N. Giedd, *The Adolescent Brain: A Work in Progress*, NAT’L CAMPAIGN TO PREVENT TEEN PREGNANCY, 19 (June 2005), <http://www.thenationalcampaign.org/resources/pdf/BRAIN.pdf>.

¹³¹ *Eddings v. Oklahoma*, 455 U.S. 104, 115–16 (1982).

¹³² *Roper v. Simmons*, 543 U.S. 551, 569–70 (2005).

¹³³ *Id.* at 570.

¹³⁴ See, e.g., 8 U.S.C. §§ 1182(a)(3)(D)(ii), 1182(a)(9)(B)(iii)(I), 1227(a)(3)(D)(ii), 1227(a)(6)(B) (2006).

tion.¹³⁵ Further, the Attorney General has interpreted various sections of otherwise general provisions of the INA such that those sections do not apply to children under eighteen years of age.¹³⁶ For example, the Board has held that juvenile delinquency determinations do not fall within criminal grounds of removal, even though no such exemption exists in the statute.¹³⁷ In the asylum context, the one year filing deadline for asylum applications makes no exception for children, but the regulations excuse unaccompanied minors.¹³⁸

In addition to their underdeveloped brains and lack of maturity, child soldiers present the mitigating factor of extreme, life threatening duress.¹³⁹ Almost every U.S. jurisdiction recognizes duress as a defense to criminal culpability.¹⁴⁰ The common law also excuses criminal acts performed under threat of “imminent death or serious bodily injury.”¹⁴¹ To establish the defense of duress, a defendant must show that: (1) he “was under an unlawful and imminent threat of such a nature as to induce a well-grounded apprehension of death or serious bodily injury;” (2) he “had not recklessly or negligently placed [him]self in a

¹³⁵ See *id.* § 1182(a)(3)(D)(ii) (providing for exception where alien was under sixteen years of age or where membership was for purposes of obtaining employment, food, or other essentials for living). Admittedly, that Congress created an age-based exception in this provision and not in the persecutor bar indicates that Congress was aware of age considerations and chose to omit them. Compare *id.*, with *id.* § 1101(a)(42)(A) (excluding from refugee protection those found to have persecuted others regardless of the age of the applicant).

¹³⁶ See, e.g., *In re Devison-Charles*, 22 I. & N. Dec. 1362, 1365 (B.I.A. 2000).

¹³⁷ See *id.* at 1365–66.

¹³⁸ See 8 C.F.R. § 208.4(a)(5)(ii) (2010). Similarly, a child does not accumulate unlawful presence for purposes of the ten-year bar until after he or she turns eighteen. See 8 U.S.C. § 1182(a)(9)(B)(iii)(I). Further, asylum officers must follow a set of specific “Guidelines for Children’s Asylum Claims” applicable to children under eighteen. See Memorandum from Jeff Weiss, Acting Dir., Office of Int’l Affairs, to Asylum Officer Corps on INS Guidelines for Children’s Asylum Claims 3 (Dec. 10, 1998), http://www.abanet.org/publicserv/immigration/ins_guidelines_for_children.pdf.

¹³⁹ See UNHCR Guidelines, *supra* note 38, ¶¶ 1–5; see also Happold, *supra* note 13, at 85.

¹⁴⁰ See, e.g., ALA. CODE § 13A-3-30 (2005); ALASKA STAT. § 11.81.440 (2008); ARIZ. REV. STAT. ANN. § 13-412 (2010); CAL. PENAL CODE § 26 (West 1999); COLO. REV. STAT. § 18-1-708 (2009); CONN. GEN. STAT. § 53a-14 (2009); DEL. CODE ANN. tit. 11, § 431 (2007); GA. CODE ANN. § 16-3-26 (2007); HAW. REV. STAT. § 702-231 (2009); IND. CODE § 35-41-3-8 (2008); KY. REV. STAT. ANN. § 501.090 (LexisNexis 2008); MO. REV. STAT. § 562.071 (2000); N.J. STAT. ANN. § 2C:2-9 (West 2005); N.Y. PENAL LAW § 40.00 (McKinney 2009); N.D. CENT. CODE § 12.1-05-10 (1997); OKLA. STAT. tit. 21, § 156 (2006); OR. REV. STAT. § 161.270 (2009); 18 PA. CONS. STAT. ANN. § 309 (West 1998); TENN. CODE ANN. § 39-11-504 (2006); TEX. PENAL CODE ANN. § 8.05 (West 2003); UTAH CODE ANN. § 76-2-302 (LexisNexis 2008); WASH. REV. CODE § 9A.16.060 (2010); WIS. STAT. § 939.46 (2008); 9 GUAM CODE ANN. § 7.61 (2005).

¹⁴¹ See, e.g., LaFAVE, *supra* note 97, at 491; 1 CHARLES E. TORCIA, WHARTON’S CRIMINAL LAW 240 (14th ed. 1978).

situation in which it was probable that [he] would be forced to perform the criminal conduct;" (3) he "had no reasonable, legal alternative to violating the law;" and (4) there was "a direct causal relationship . . . between the criminal act and the avoidance of the threatened harm."¹⁴² The plight of child soldiers easily satisfies these elements.

In her landmark comprehensive study of the impact of armed conflict on children, Graça Machel reported that children are valued as soldiers because they are "more obedient, do not question orders and are easier to manipulate than adult soldiers."¹⁴³ Machel further reported, "Child soldiers are recruited in many different ways. Some are conscripted, others are press-ganged or kidnapped and still others are forced to join armed groups to defend their families."¹⁴⁴ Though many children "present themselves for service[,] [i]t is misleading, however, to consider this voluntary."¹⁴⁵ Children may volunteer because it may be the only way to assure food, shelter, and protection.¹⁴⁶ Another commentator has noted, "Children who grow up in war zones might not see any positive place for themselves in society; in their situations they are oppressed, have little or no access to education, feel powerless and alienated, and have been denied positive life options."¹⁴⁷ Others are caught up in a cycle of violence spurred on by "revenge [because of the murder of a relative], the conviction to continue the struggles of lost loved ones, the need to substitute an annihilated family or social structure, and the desire to take control over events that shape one's cir-

¹⁴² *Dixon v. United States*, 548 U.S. 1, 4 n.2 (2006).

¹⁴³ Graça Machel, *Impact of Armed Conflict on Children*, ¶ 34, transmitted by Note of the Secretary-General, U.N. Doc. A/ 51/306 (Aug. 26, 1996) [hereinafter Machel Report] (quoting RACHEL BRETT ET AL., CHILDREN: THE INVISIBLE SOLDIERS 88 (1996)). Other commentators have noted that child soldiers are both "expendable and exploitable" and "can be turned into the fiercest fighters." COHN & GOODWIN-GILL, *supra* note 78, at 27, 93. In 1993, the U.N. General Assembly, "[p]rofoundly concerned about the grievous deterioration in the situation of children in many parts of the world as a result of armed conflicts," authorized the U.N. Secretary-General to appoint an expert "to undertake a comprehensive study of this question, including the participation of children in armed conflict." G.A. Res. 48/157, pmbl., ¶ 7, U.N. Doc. A/RES/48/157 (Mar. 7, 1994). The Secretary-General appointed Machel, and the General Assembly accepted her report on August 26, 1996. See Machel Report, *supra*, ¶ 1.

¹⁴⁴ Machel Report, *supra* note 143, ¶ 36. Forced recruitment usually involves "the threat or actual violation of the physical integrity of the youth or someone close to him or her, [which] is practised by both armed opposition groups and national armed forces." COHN & GOODWIN-GILL, *supra* note 78, at 24. Children in refugee camps are at particularly high risk for recruitment. See WESSELLS, *supra* note 110, at 25, 37-38.

¹⁴⁵ Machel Report, *supra* note 143, ¶ 38.

¹⁴⁶ See *id.* ¶ 39.

¹⁴⁷ WESSELLS, *supra* note 110, at 3.

cumstances.”¹⁴⁸ Ideology and susceptibility to propaganda may also provide a hard-to-resist incentive.¹⁴⁹ During the Iran-Iraq war, for example, thousands of children died in combat after being told that participating in a holy war guaranteed access to heaven.¹⁵⁰

Once recruited, however, child soldiers are subjected to brutal induction ceremonies in which attempts are made to harden children emotionally by punishing those who offer help or display feelings for others subjected to abuse.¹⁵¹ Children are often beaten up and continuously exposed to scenes of violence so that they do not question the authority of the adults in the group; sometimes they are even forced to kill captives or their own family members.¹⁵² Typically, armed groups use a child’s participation in killing as a method of control and to “cut child recruits off from their former lives, rupturing their bonds with family and community.”¹⁵³ Forced participation in killing is also utilized to condition the children to violence, so that they experience “as normal what most people would regard as abnormal.”¹⁵⁴ Armed groups often use “cannibalistic practices such as forcing children to drink the blood of those who had been killed” to condition and reduce the fear of children in combat.¹⁵⁵ Additionally, many armed groups require drug use, whereby the children’s “‘crazy’ behavior becomes a combat

¹⁴⁸ COHN & GOODWIN-GILL, *supra* note 78, at 32; see *Why Children Join*, COAL. TO STOP THE USE OF CHILD SOLDIERS, <http://www.child-soldiers.org/childsoldiers/why-children-join> (last visited Jan. 20, 2011).

¹⁴⁹ See Machel Report, *supra* note 143, ¶ 49.

¹⁵⁰ See Maryam Elahi, *The Rights of the Child Under Islamic Law: Prohibition of the Child Soldier*, 19 COLUM. HUM. RTS. L. REV. 259, 278 (1988). The force of ideology and propaganda cannot be understated. See, e.g., *id.* In 2007, the Nobel Prize-winning author Günter Grass surprised the world when he confessed to having served in the Waffen S.S. during World War II, albeit for a brief period in which he never fired a shot. See Günter Grass, *How I Spent the War*, NEW YORKER, June 4, 2007, at 68. According to Grass: “What I did cannot be put down to youthful folly. No pressure from above.” *Id.* Yet, he relayed a tragicomic story of how he had been compelled to serve in the largely youth-based home defense Luftwaffe Auxiliary at age fifteen; he stated, “Rabidly pubescent, we considered ourselves the mainstays of the home front.” *Id.* There, he was “a pushover for the prettified black-and-white ‘truth’” served up by the newsreels. *Id.* at 70. When he was finally called up for duty at the front at age seventeen and assigned to the Waffen S.S., he stated, “There is nothing carved into the onion skin of my memory that can be read as a sign of shock, let alone horror.” *Id.* at 74. He continued, “I most likely viewed the Waffen S.S. as an elite unit that was sent into action whenever a breach in the front line had to be stopped up.” *Id.*

¹⁵¹ See WESSELLS, *supra* note 110, at 59–71; see also Machel Report, *supra* note 143, ¶ 44.

¹⁵² See WESSELLS, *supra* note 110, at 64–75; see also Machel Report, *supra* note 143, ¶ 44.

¹⁵³ WESSELLS, *supra* note 110, at 59.

¹⁵⁴ *Id.* at 57.

¹⁵⁵ *Id.* at 75.

ritual through which [they] demonstrate their machismo in a deadly mixture of fearlessness and uncontrolled violence.”¹⁵⁶

Needless to say, serving as a child soldier “affects all aspects of child development—physical, mental, and emotional.”¹⁵⁷ But as Dr. Michael Wessells has noted, it would be a mistake to believe that such an experience has damaged the child beyond repair.¹⁵⁸ He states:

One of the most prevalent images is that child soldiers are damaged goods. One sees images of a lost generation, of teenagers who not only lost their childhood and opportunity for education, but also their chance for proper moral development. These images portray youth as not just perpetrators but hardened killers who can never go home. The evidence now available, although it is not highly systematic, indicates the contrary. The majority of former child soldiers are resilient, not damaged, and able to reintegrate into civilian life with varying degrees of success. It is a disservice to these young people to suggest otherwise. Although there are dysfunctions that must be addressed, their resilience far outweighs any dysfunction.¹⁵⁹

Carefully designed Disarmament, Demobilization, and Reintegration (DDR) programs that have made special provisions for child soldiers involving counseling, health screening, transition planning, and family reunification have been able to successfully reintegrate former combatants back into their communities.¹⁶⁰ To that end, the United States has contributed over ten million dollars through the Agency for International Development “to international programs aimed at preventing the recruitment of children and reintegrating child ex-combatants into society.”¹⁶¹

¹⁵⁶ *Id.* at 76–77.

¹⁵⁷ See Machel Report, *supra* note 143, ¶ 166.

¹⁵⁸ See Michael Wessells, *Psychosocial Issues in Reintegrating Child Soldiers*, 37 CORNELL INT’L L.J. 513, 515 (2004).

¹⁵⁹ *Id.*

¹⁶⁰ See *id.* at 518–25. Machel noted that in many instances, reunification with community and family is simply impossible. See Machel Report, *supra* note 143, ¶ 52. This is particularly true for girls who served as child soldiers and who, during their service, were raped or had children by their comrades. See *id.* ¶ 51. For these young victims, reacceptance into the community is particularly hard because they are no longer suitable for marriage under traditional norms. See *id.*

¹⁶¹ U.S. Report on the Optional Protocol, *supra* note 18, ¶¶ 34–35.

III. A METHOD FOR APPLYING THE PERSECUTOR BAR TO CHILD SOLDIERS

During the *Negusie* oral argument, Justice Alito asked “[h]ow would the balancing be struck” to determine when a lack of personal culpability would excuse the application of the persecutor bar.¹⁶² Immigration judges regularly make such determinations based on a case-by-case evaluation of a person’s moral fiber and worthiness to remain in the United States.¹⁶³ In the context of removal based on criminal convictions for example, the BIA has established a workable system of balancing the seriousness of the alien’s criminal misconduct against the equities presented in the individual’s case.¹⁶⁴ There is no reason to think that immigration judges would be any less capable of making similar determinations in the context of child soldiers.

In light of a number of factors, including: (1) the prohibition against recruitment of those under fifteen contained in the CRC; (2) the ICC’s codification of the recruitment of those under fifteen as a war crime; and (3) the Optional Protocol’s bar to recruitment of fifteen-year-olds, if a person’s conduct occurred when the before he or she turned fifteen, then he or she cannot be held morally accountable for his or her actions.¹⁶⁵ This conclusion is just as strong today as it was during the formation of the Special Court of Sierra Leone.¹⁶⁶ Thus, the persecutor bar should not apply to those under sixteen.¹⁶⁷ For those who served at age sixteen or seventeen, the burden remains on the government to show that the child soldier’s conduct rose to the level of persecution.¹⁶⁸

Next, any analysis must account for the fact that child soldiers perform many non-combat functions. These include “laying mines and explosives; scouting, spying, acting as decoys, couriers or guards; training, drill or other preparations; logistics and support functions, portering,

¹⁶² Transcript of Oral Argument at 9, *Negusie v. Holder*, 129 S. Ct. 1159 (2009) (No. 07-499).

¹⁶³ See, e.g., *In re Marin*, 16 I. & N. Dec. 581, 583 (B.I.A. 1978).

¹⁶⁴ See *id.* at 584–85.

¹⁶⁵ See Rome Statute, *supra* note 80, art. 8(2)(b)(xxvi); CRC, *supra* note 10, art. 38(2); Geneva Protocol I, *supra* note 10, art. 77(2).

¹⁶⁶ See Sierra Leone Special Court Report, *supra* note 86, ¶ 15(c).

¹⁶⁷ See *id.*; see also Rome Statute, *supra* note 80, art. 8(2)(b)(xxvi); CRC, *supra* note 10, art. 38(2); Geneva Protocol I, *supra* note 10, art. 77(2).

¹⁶⁸ See 8 C.F.R. § 1240.8(d) (2010) (“If the evidence indicates that one or more of the grounds for mandatory denial of the application for relief may apply, the alien shall have the burden of proving by a preponderance of the evidence that such grounds do not apply.”).

cooking and domestic labour . . . [and] sexual slavery.”¹⁶⁹ These are not acts of persecution. Drawing on the *Fedorenko* Court’s observation that the Jewish prisoners in Treblinka who were assigned tasks that formed a part of the daily workings at the death camp could not be considered to have assisted in the persecution of others, the test for the application of the persecutor bar to child soldiers must consider that child soldiers assigned to non-combat tasks forming part of the daily routine of a military organization did not engage in persecution of others.¹⁷⁰

Where a child soldier who, at age sixteen or seventeen, engaged in conduct that would be deemed persecution, the Board should take heed of the *Hernandez* analysis and, in a manner consistent with Article 1F of the Refugee Convention, require immigration judges to weigh factors such as whether the child soldier was conscripted or volunteered; adopted the persecutory goals of the group; received any benefits, reward, or promotion for service; length of service; rank; opportunities to escape; and whether the he or she was forthcoming with information.¹⁷¹

Two Canadian cases illustrate this analysis.¹⁷² First, in *Ramirez v. Canada*, the court upheld the application of the exclusion clause to an asylum applicant who had served in the Salvadoran army for two and a half years starting at age seventeen and then deserted.¹⁷³ Ramirez had enlisted voluntarily, re-enlisted after two years, rose to the rank of sergeant, fought in excess of one hundred engagements, and witnessed the torture and killing of many prisoners.¹⁷⁴ Despite Ramirez’s assertion that he deserted the army after an ideological conversion, the court held:

[Ramirez] could never be classed as a simple on-looker, but was on all occasions a participating and knowing member of a military force, one of whose common objectives was the torture of prisoners to extract information. This was one of the things his army did, regularly and repeatedly, as he admitted. He was a part of the operation, even if he personally was in no sense a “cheering section.” In other words, his presence at this

¹⁶⁹ *Child Soldiers Global Report 2008*, COAL. TO STOP THE USE OF CHILD SOLDIERS, 411 (2008), http://www.childsoldiersglobalreport.org/files/country_pdfs/FINAL_2008_Global_Report.pdf.

¹⁷⁰ See *Hernandez v. Reno*, 258 F.3d 806, 813 (8th Cir. 2001) (construing *Fedorenko v. United States*, 449 U.S. 490, 512 n.34 (1981)).

¹⁷¹ See *id.* at 814.

¹⁷² See *Moreno v. Canada* (Minister of Emp’t & Immigration) (1993), 107 D.L.R. 4th 424, 424–25 (Can. F.C.A.); *Ramirez v. Canada* (Minister of Emp’t & Immigration) (1992), 89 D.L.R. 4th 173, 182–87 (Can. F.C.A.).

¹⁷³ See *Ramirez*, 89 D.L.R. 4th at 182–87.

¹⁷⁴ See *id.*

number of incidents of persecution, coupled with his sharing in the common purpose of the military forces, clearly constitutes complicity.¹⁷⁵

By way of contrast, in *Moreno v. Canada*, the court held that the exclusion clause should not apply where the applicant had been forcibly conscripted into the Salvadoran army at sixteen years old, served only four months, participated in only five armed conflicts in which civilians were killed, stood guard outside a locked cell where a prisoner was tortured, and deserted as soon as his family was able to raise the money for his escape.¹⁷⁶ According to the court, “A person forcibly conscripted into the military and who on one occasion witness[ed] the torture of a prisoner while on assigned guard duty cannot be considered at law to have committed a crime against humanity.”¹⁷⁷

CONCLUSION

It is now well established that by enacting the Refugee Act of 1980, Congress intended to bring U.S. law into conformity with the 1967 United Nations Refugee Protocol and aligned the United States with the international approach to the treatment of refugees.¹⁷⁸ The imposition of a per se bar to child soldiers seeking asylum contravenes the international and domestic efforts to protect child soldiers. Worse, it effectively cuts off an important avenue of escape for child soldiers, emboldens the warlords that enslave them with the knowledge that the children have nowhere to turn for protection, and unduly stigmatizes the children at a time when they most need help for recovery and rehabilitation. Given the circumstances under which they are held and compelled to serve, as well as the wide recognition of the diminished culpability of youth, child soldiers should be able to argue that their conduct falls beyond the scope and intent of the persecutor bar.

¹⁷⁵ *Id.* at 187–88.

¹⁷⁶ *See Moreno*, 107 D.L.R. 4th at 424–25.

¹⁷⁷ *Id.* at 425.

¹⁷⁸ *See INS v. Cardoza-Fonseca*, 480 U.S. 421, 436–37 (1987). *See generally* Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (codified as amended in scattered sections of 8 U.S.C.). Like the prohibition against torture, the prohibition against refoulement to persecution is an accepted principle of customary international law, which nations accept as a binding legal norm in the absence of a treaty or other source of legal obligation. *See The Paquete Habana*, 175 U.S. 677, 700 (1900). U.S. courts are bound to apply customary international law where there is no treaty and no controlling executive or legislative act or judicial decision. *See In re Medina*, 19 I. & N. Dec. 734, 743 (B.I.A. 1988).

